**UNITED STATES OF AMERICA**
**MERIT SYSTEMS PROTECTION BOARD**

**2013 MSPB 20**

Docket No. DE-3330-12-0147-I-1

**Jesse M. Washburn,**

**Appellant,**

**v.**

**Department of the Air Force,**

**Agency.**

March 4, 2013

Jesse M. Washburn, Colorado Springs, Colorado, pro se.

Laurence M. Soybel, Esquire, Joint Base Andrews, Maryland, for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

## OPINION AND ORDER

¶1 The agency has filed a petition for review of the initial decision in this Veterans Employment Opportunities Act of 1998 (VEOA) appeal in which the administrative judge found that it denied the appellant his right to compete for an appointment in violation of 5 U.S.C. § 3304(f)(1). For the reasons set forth below, we DENY the agency's petition and AFFIRM the initial decision to the extent that the administrative judge found that the agency violated the appellant's right to compete under that section. Nevertheless, we REMAND this appeal for further adjudication on the issue of whether the appeal is now moot.

## BACKGROUND

¶2 The appellant retired from the Air Force at the rank of Major, under honorable conditions, after 20 years of active service. Initial Appeal File (IAF), Tab 11 at 64. The appellant subsequently applied for a competitive service GS-0391-13 Telecommunications Specialist position with the Department of the Air Force under merit promotion announcement 9L-STRATCOM-568797-448851-K. IAF, Tab 4 at 5, Tab 6 at 5, Tab 11 at 33. The position was to be within the United States Strategic Command (STRATCOM), a Department of Defense (DOD) unified combatant command that includes elements of the Air Force, the Army, the Navy, and the Marine Corps. IAF, Tab 4 at 5, Tab 16 at 9-10; *see* 10 U.S.C. § 161; 32 C.F.R. § 158.3. The agency indicated that it would accept applications from "Air Force Employee[s]" and "[DOD] Transfer (Army, Navy, DFAS, etc. – Excluding Air Force)." IAF, Tab 4 at 5. The Department of the Air Force did not refer the appellant to the selecting official because it determined he was ineligible on the basis that he was not a current DOD employee. IAF, Tab 11 at 16, 22, 60. It explained that the job announcement was internal and therefore "not open to applicants with a VEOA eligibility." *Id*. at 16.

¶3 The appellant filed a VEOA complaint with the Department of Labor (DOL) challenging the ineligibility determination, but DOL was unable to resolve the dispute. IAF, Tab 11 at 14, 57-58. The appellant filed a Board appeal. IAF, Tab 1. The administrative judge issued an initial decision finding that the agency denied the appellant his right to compete and ordering the agency to reconstruct the selection process. IAF, Tab 17, Initial Decision (ID) at 1-2, 6. The administrative judge considered the agency's argument that the announcement was internal because it was limited to the defense agencies whose employees comprise the STRATCOM workforce. IAF, Tab 11 at 8-11, Tab 16 at 5-6; ID at 5-6. However, he found that the Department of the Air Force was the agency for

purposes of the selection process and that the location of the position within the command structure of STRATCOM was immaterial. ID at 5-6.

¶4 The agency has filed a petition for review arguing that the administrative judge defined "workforce" too narrowly under the facts of this case. Petition for Review (PFR) File, Tab 1 at 6-8, 10. The agency also argues for the first time that the appeal is moot because it has already afforded the appellant an opportunity to compete for the Telecommunications Specialist position. PFR File, Tab 1 at 8-10. The appellant has not filed a response.

## ANALYSIS

### The announcement was open to individuals outside the agency's own workforce.

¶5 Section 3304(f)(1) of title 5 provides that:

> Preference eligibles or veterans who have been separated from the armed forces under honorable conditions after 3 years or more of active service may not be denied the opportunity to compete for vacant positions for which the agency making the announcement will accept applications from individuals outside its own workforce under merit promotion procedures.

5 U.S.C. § 3304(f)(1). A veteran who alleges that an agency violated this provision may file a VEOA complaint with DOL, and, if DOL does not resolve the matter, he may file a Board appeal. 5 U.S.C. § 3330a(a)(1)(B), (d); *see Styslinger v. Department of the Army*, 105 M.S.P.R. 223, ¶ 22 (2007).[1]

¶6 The main issue in this case is whether the applications that the agency solicited from "[DOD] Transfer (Army, Navy, DFAS, etc. . . .)," IAF, Tab 4 at 5, were "from outside its own workforce," 5 U.S.C. § 3304(f)(1), thus entitling the appellant to be considered for the position. The agency argues that the

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[1] The appellant is a "veteran" within the meaning of 5 U.S.C. § 3304(f)(1). Although he may not be preference eligible because he retired at the rank of Major, *see* 5 U.S.C. § 2108(4)(B), he is nevertheless covered as a "veteran" because he "separated from the armed forces under honorable conditions after 3 years or more of active service," 5 U.S.C. § 3304(f)(1); *see Styslinger*, 105 M.S.P.R. 223, ¶¶ 23-30.

administrative judge erred in finding that "the applicable 'workforce' for purposes of 5 U.S.C. § 3304(f)(1) was limited to Air Force employees rather than all DOD employees." PFR File, Tab 1 at 6. It explains that, although the Department of the Air Force was the hiring authority, the workforce for which it was hiring was STRATCOM, which is comprised of employees from all across DOD. The agency argues that the key to this case is the definition of the term "workforce" and that the term should be defined in light of the pan-DOD character of STRATCOM rather than solely by the Air Force component, which was only the conduit for the appointment. *Id*. at 6-8. We agree with the agency that this case hinges on whether the administrative judge correctly identified the scope of the "workforce" at issue. However, the plain language of the statute defines the scope of the "workforce" as that of "the agency making the announcement." 5 U.S.C. § 3304(f)(1). We therefore find that the more pertinent question is how to define the term "agency."

¶7 Here, the relationship between the Air Force, a 5 U.S.C. § 102 military department, and DOD, a 5 U.S.C. § 101 executive agency, makes this a complex issue. In this regard, we find the Office of Personnel Management's regulations at 5 C.F.R. part 330 to be instructive. For general purposes of recruitment, selection, and placement, the Office of Personnel Management defines "agency" as:

> (1) An Executive department listed at 5 U.S.C. 101;
>
> (2) A military department listed at 5 U.S.C. 102;
>
> (3) A Government owned corporation in the executive branch;
>
> (4) An independent establishment in the executive branch as described at 5 U.S.C. 104; and
>
> (5) The Government Printing Office.

5 C.F.R. § 330.101(a).[2] Under this definition, the Department of the Air Force is an agency independent of DOD, and this would suggest that the Department of the Air Force, rather than DOD, was "the agency making the announcement" in this case. 5 U.S.C. § 3304(f)(1).

¶8 This conclusion is supported by the Board's case law concerning the National Security Act Amendments of 1949, ch. 412, 63 Stat. 578. After World War II, Congress coordinated the United States armed forces by placing the Department of the Army, the Department of the Navy, and the Department of the Air Force "under civilian control of the Secretary of Defense," while at the same time explicitly not merging those departments but rather retaining their separate organizational characteristics. National Security Act Amendments of 1949 § 2 (codified as amended at 50 U.S.C. § 401); *see* 10 U.S.C. §§ 111, 8011; *White v. Department of the Army*, 115 M.S.P.R. 664, ¶ 7 (2011). The Board and the U.S. Court of Appeals for the Federal Circuit have consistently found that personnel matters are among those in which the military departments retain their separate authority. In *Francis v. Department of the Navy*, 53 M.S.P.R. 545, 548-51 (1992), the Board discussed the 1949 Act extensively and concluded that the military departments constitute separate agencies for purposes of probationary periods under 5 C.F.R. part 315H. Although the Board's decision did not address the term "agency" in the context of 5 U.S.C. § 3304(f), it was based on a broad finding that Congress intended "to allow [the military departments'] independent appointing authority and other personnel functions to continue" even after their integration into DOD. *Id*. at 551. In a subsequent case nearly identical to *Francis*, the Federal Circuit adopted the Board's reasoning and further noted that the fact that the military departments are also part of DOD is not inconsistent

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[2] The Department of the Air Force may also arguably satisfy the criteria to be a "component" of DOD under 5 C.F.R. § 330.101(a). This, however, is only incidental. We find that the relevant statutes and regulation clearly contemplate their treatment as separate agencies. 5 U.S.C. §§ 101, 102; 5 C.F.R. § 330.101(a).

with their separate treatment for personnel purposes. *Pervez v. Department of the Navy*, 193 F.3d 1371, 1373-74 (Fed. Cir. 1999). The Board has more recently had occasion to revisit the issue in the context of the Back Pay Act, and once again affirmed that the military departments are independent from DOD and from each other in discretionary matters of hiring and personnel management. *White*, 115 M.S.P.R. 664, ¶¶ 7-11. Based on the independent character of the Air Force's appointing authority, we find that the Department of the Air Force, not DOD, is the agency that made vacancy announcement 9L-STRATCOM-568797-448851-K, and therefore the "workforce" at issue in this case is that of the Department of the Air Force and not that of the Department of the Army, the Department of the Navy, or any other component of DOD. Although the agency is correct that the announcement was open only to current DOD employees, this is immaterial because DOD is not the "agency" in this case for purposes of 5 U.S.C. § 3304(f)(1). IAF, Tab 16 at 5-6.

¶9 This is so even though the vacancy announcement was for a position within the STRATCOM unified combatant command. We agree with the agency that the position at issue was within the STRATCOM workforce. IAF, Tab 4 at 5; PFR File, Tab 1 at 6. We also agree that the STRATCOM workforce includes employees from all across DOD—not just the Department of the Air Force. IAF, Tab 16 at 9-10; PFR File, Tab 1 at 6-7. However, the agency does not argue that STRATCOM was "the agency making the announcement" in this case, and we find that such an argument would be implausible because STRATCOM is not an "agency" for purposes of title 5 recruitment, selection, and placement.[3] *Cf.* 5 C.F.R. § 330.101(a). Rather, the STRATCOM workforce is composed of "forces from two or more military departments." IAF, Tab 16 at 9-10;

[3] In any event, this argument would be unavailing under the facts of the instant appeal because the vacancy announcement was not limited to current STRATCOM employees. IAF, Tab 4 at 5.

10 U.S.C. § 161(c)(1). In other words, although the STRATCOM workforce has unified direction under DOD, it is nevertheless composed of elements of multiple title 5 agency workforces. *See* 10 U.S.C. § 162; *cf. Jolley v. Department of Homeland Security*, 105 M.S.P.R. 104, ¶¶ 7-16 (2007) (the appellant had a right to compete for a vacancy open to "employees of the [Federal Law Enforcement Training Center] and on-site partner organizations" because the on-site partner organizations were components of agencies other than the agency making the announcement). We therefore agree with the administrative judge's characterization of the vacancy announcement as being for a Department of the Air Force position "within the command structure of STRATCOM." ID at 5.

¶10 Finally, we find that the documentary evidence in this case is consistent with our finding that the Department of the Air Force was the agency making the announcement. As the administrative judge correctly noted, the agency's notification of results to the appellant stated that "[t]his is a record of your application for employment with the US Air Force," ID at 5; IAF, Tab 11 at 60, and the selecting official was an Air Force employee, ID at 5; IAF, Tab 11 at 32. In addition, as the court noted in *Pervez*, a Standard Form 50 documenting personnel actions will indicate the applicable military department as the employing agency—not DOD. 193 F.3d at 1374. Although the agency argues that a "problem" with the Office of Personnel Management's USAJOBS website led to the appearance that the announcement was open to VEOA-eligible candidates, IAF, Tab 4 at 5, Tab 11 at 10, 16, we find nothing inconsistent between the USAJOBS announcement and the law cited above.

¶11 For these reasons, we find that the Department of the Air Force was the agency making the announcement and that the agency accepted applications from outside its own workforce. Therefore, the provisions of 5 U.S.C. § 3304(f)(1) apply. Under that section, the appellant, a veteran who honorably separated from the armed forces after 3 or more years of active duty, was entitled to compete for

the position. The agency violated his rights under that section by improperly finding him ineligible.

The appeal may be moot.

¶12 Mootness can arise at any stage of litigation. An appeal will be dismissed as moot when, by virtue of an intervening event, the Board cannot grant any effectual relief in favor of the appellant, as when the appellant, by whatever means, obtained all of the relief he could have obtained had he prevailed before the Board and thereby lost any legally cognizable interest in the outcome of the appeal. *Price v. U.S. Postal Service*, 118 M.S.P.R. 222, ¶ 8 (2012).

¶13 On petition for review, the agency argues that the appellant was afforded an opportunity to compete for the Telecommunications Specialist position prior to the close of the record below. PFR File, Tab 1 at 8-10. The agency has submitted evidence that it "cleared" a Priority Placement Program match and then opened recruitment to both internal and external candidates. *Id*. at 11. The agency then created a certificate of eligibles on which the appellant was included as a qualified applicant, although he was not ultimately selected.[4] *Id*. at 11-19. The agency correctly argues that, under 5 U.S.C. § 3304(f)(1), the appellant is entitled only to a lawful selection process in which he is considered on the same footing as other candidates. He is not necessarily entitled to an appointment. PFR File, Tab 1 at 9; *see Wheeler v. Department of Defense*, 113 M.S.P.R. 376, ¶¶ 16-17 (2010).

¶14 Nevertheless, based on the current record, we are unable to find that the agency has actually allowed the appellant to compete in the same selection process that it would have been required to conduct pursuant to a Board order. In order to properly reconstruct a selection, an agency must conduct an actual

[4] It appears that the certificate was issued pursuant to the same vacancy announcement at issue in this appeal, 9L-STRATCOM-568797-448851-K, because it reflects the same 448851 identifying number. PFR File, Tab 1 at 13.

selection process based on the same circumstances surrounding the original faulty selection. This includes taking the original selectees out of their positions, conducting and evaluating interviews so that they are meaningfully comparable with the original selectees' interviews, and filling the same number of vacancies as before. *Phillips v. Department of the Navy*, 114 M.S.P.R. 19, ¶¶ 15-19 (2010). Based on the current record, we are unable to determine how many vacancies were filled pursuant to the announcement at issue, whether a priority placement candidate was ever actually appointed, or whether the appellant was competing with the same pool of candidates with whom he would have competed had the agency not improperly found him ineligible prior to opening the vacancy to external candidates. What is particularly puzzling is why and how external candidates appeared on a certificate of eligibles that the agency issued pursuant to a vacancy announcement that it still maintains properly excluded such candidates.

¶15 Because the mootness issue goes to the heart of the Board's remedial authority in this case, we find it appropriate to remand the appeal for further adjudication limited to the issue of mootness. On remand, the administrative judge shall require the agency to submit evidence sufficient to explain the history of vacancy announcement 9L-STRATCOM-568797-448851-K so that he can determine what actually occurred, and he shall afford the appellant an opportunity to respond to the agency's submission.

## ORDER

¶16 We remand this appeal to the Denver Field Office for further adjudication consistent with the Opinion and Order.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.